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No. 81-9

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF WASHINGTON, ET AL., APPELLANTS

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an initiative establishing a statewide neighborhood school policy violates the Equal Protection Clause of the Fourteenth Amendment.[1]

[1] Appellants also challenge an award of attorneys' fees to parties other than the United States. The United States does not address that issue.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. B-1 to B-29) is reported at 633 F. 2d 1338. The opinion of the district court (J.S. App. A-1 to A-36) is reported at 473 F. Supp. 996.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1980, and a petition for rehearing was denied on March 26, 1981 (J.S. App. E-1). A notice of appeal was filed on May 18, 1981 (J.S. App. D-1 to D-6). This Court noted probable jurisdiction on October 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

STATEMENT

This case, like *Crawford* v. *Board of Education*, No. 81-38, involves a constitutional challenge to a state restriction on the use of mandatory nonneighborhood student assignments to alleviate racial imbalance not caused by de jure segregation. Here, the challenged restriction was enacted shortly after Seattle School District No. 1, the State of Washington's largest school district, abandoned its traditional policy favoring neighborhood schools and implemented a plan of race-conscious student assignments to create racial balance in the district's schools. A principal component of the plan was the mandatory busing of entire neighborhoods of students to schools beyond those closest to the students' homes. Initiative 350, adopted by a majority of Washington voters at a statewide referendum, reversed the action taken by the school district by establishing a state educational policy favoring neighborhood schools. The Initiative generally prohibits mandatory busing beyond the nearest or next nearest school to a student's home. The Seattle School District, joined by two other school districts and certain individual plaintiffs, commenced this litigation to challenge the constitutionality of Initiative 350. This case is here on appeal from the decision of the court of appeals, which concluded that, in adopting a statewide neighborhood school policy, Initiative 350 violates the Equal Protection Clause of the Fourteenth Amendment.

1. Seattle School District No. 1, a municipal corporation created under the laws of the State of Washington, encompasses an area substantially coterminous with the City of Seattle (J.S. App. A-1 to A-2). Racial minorities historically have accounted for a substantial proportion of the district's enrollment (Pltf. Exh. 8). At present, the district has an enrollment of approximately 54,000 students, approximately 37% of whom are either black, Asian, American Indian or Hispanic (J.S. App. A-2). For at least the past 18 years, the district has taken steps to alleviate the isolation of these minori-

ties from the rest of the district's student community (J.S. App. A-14 to A-18).[2]

2. In April 1976, the district hired a new school superintendent and specifically directed him to devise a program to racially balance the district's schools (Moberly Affidavit at 1-2; Pltf. Exh. 6 at 7). The superintendent organized a special staff for that purpose, and conducted public meetings to discuss the approach to be taken by the district in promoting racial balance within its schools (Moberly Affidavit at 2-3). According to the superintendent, these meetings stressed the use of voluntary strategies to achieve such balance (*id.* at 2).

During this period, substantial pressure was exerted on the district to take effective action to achieve racial balance (Moberly Affidavit at 4). Local or state affiliates of the National Association for the Advancement of Colored People, the American Civil Liberties Union and the National Urban League, as well as the Church Council of Greater Seattle, each threatened to file suit should the district not make progress toward racial balance (*id.* at 4-5).[3] On May 25, 1977, the district received

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[2] In 1963, when racial minorities accounted for approximately 15% of the district's enrollment (Pltf. Exh. 8), the district initiated a series of voluntary racial transfer programs (J.S. App. A-16). Under these programs, the district promoted and has continued to promote the transfer and transportation of students to schools outside their residential areas whenever such transfers have promised to alleviate racial imbalance (*ibid.*). These programs had approximately 1,400 participants in 1977 (Def. Exh. A-99 at Exh. H).

[3] On April 20, 1977, the local branch of the NAACP filed an administrative complaint with HEW's Office for Civil Rights pursuant to Title VI of the Civil Rights Act of 1964, charging the district with having "taken action which it knew, or should have known, would have segregative results, in continuing or intensifying racial segregation in the Seattle Public Schools" (Pltf. Exh. 69 at 12-15). The complaint requested an administrative investigation and HEW scheduled such an investigation for the fall of 1978 (*id.* at 7, 15). The investigation was ultimately postponed as a result of the district's implementation of a mandatory busing program in September of 1978 (*id.* at 7-8, 16-18).

a letter from the mayor of Seattle and the presidents of the Seattle Chamber of Commerce, the Municipal League of Seattle and King County, and the Seattle Urban League, urging the district to adopt a definition of racial imbalance and to act to eliminate such imbalance in Seattle through an effective program developed and adopted with extensive community involvement (Pltf. Exh. 11). On June 8, 1977, the district passed resolutions defining racial imbalance (Pltf. Exh. 9)[4] and committing the district to eliminate all such imbalance by the start of the 1979-1980 school year (Pltf. Exh. 10).[5]

In September 1977, a "magnet" schools program was implemented by the district (J.S. App. A-16). Developed in late 1976 and early 1977, the program involved significantly enhancing the educational attractiveness of a number of schools, to which students could voluntarily transfer when their doing so promoted racial balance (*ibid.*). Approximately 2,600 voluntary racial transfers were produced by the program, surpassing the district's goal of 1,000 transfers (Def. Exh. A-99 at Exh. H).[6] But, although a September 16, 1977 open letter to Seattle citizens from the district superintendent called the "substantial success" of the program "extremely encourag-

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[4] "Racial imbalance" was defined as "the situation that exists when the combined minority student enrollment in a school exceeds the District-wide combined minority average by 20 percentage points, provided that the single minority enrollment (as defined by current federal categories) of no school will exceed 50 percent of the student body" (Pltf. Exh. 9). According to this definition, 23 of the district's 112 schools were at that time "racially imbalanced" (Pltf. Exh. 8).

[5] The resolution directed the district superintendent to eliminate racial imbalance through continuation of the voluntary racial transfer programs that had been in operation since 1963, through implementation of a magnet schools program, and through adoption, upon board approval, of such additional measures as were necessary (Pltf. Exh. 10).

[6] Other voluntary racial transfer programs in the district produced approximately 1,400 additional racial transfers in 1977. See note 2, *supra*.

ing" (*id.* at Exh. F), the superintendent concluded that, because of demographic changes in the district, the program was making little headway toward the achievement of racial balance (Def. Exh. A-118 at 50). The superintendent was of the opinion that approximately 8,000 additional transfers would be needed (Def. Exh. A-99 at Exh. B), and district citizens were invited to participate in a series of community meetings scheduled for October and November 1977 to discuss how to achieve complete racial balance by the beginning of the 1979-1980 school year (*id.* at Exh. F).

At the October and November meetings, the district presented for public response five alternative racial balancing plans considered capable of achieving the 1979-1980 goal of complete racial balance (Def. Exh. A-99 at Exh. H). Three of the plans, each drafted by the district, relied on voluntary measures as a first strategy for achieving such balance, with provisions for mandatory measures should the voluntary measures prove ineffective (*ibid.*). Two of the plans, one drafted by the district and one by the Seattle Urban League, placed primary reliance on mandatory measures (*ibid.*). After the meetings, the district superintendent concluded that "the one thing that came through there was that everybody wanted a voluntary movement" (Def. Exh. A-118 at 110); it was "quite evident" that the community favored a voluntary plan (*ibid.*).

Notwithstanding his perception of community desire, in late November the superintendent submitted a mandatory racial balancing plan to the district board of education for its consideration. The plan, which had not been previously presented to the community, was labelled "The Seattle Plan" and relied on extensive mandatory student reassignments and busing to meet the board's 1979-1980 racial balancing deadline (J.S. App. A-17 to A-18).[7] A

[7] The superintendent recommended a mandatory plan because, based upon his opinion of the district's ability to raise funds, "the only realistic and cost-efficient program was one which did not (1) require large yearly expenditures to attract and recruit voluntary

principal component of the plan, intended in part to achieve racial balance without destroying the students' sense of their "ethnic identity" (Moberly Affidavit at 19; Pltf. Exh. 7 at 15), was the mandatory reassignment of entire neighborhoods of students to schools beyond those closest to the students' homes (J.A. App. A-17 to A-18).

In early December, after the district superintendent's recommendation had been made public, but before the board had met to vote on whether or not to adopt it, a number of Seattle parents met and organized a group called the Citizens for Voluntary Integration Committee ("CiVIC") (Pltf. Exh. 40 at Exh. 3). At the initial organizational meeting, the parents voiced objections to the mandatory Seattle Plan and called upon the school board "to delay their decision so we can present a truly voluntary program that will work" (*ibid.*). After the board approved a resolution on December 14, 1977, setting forth and adopting the essentials of the mandatory Seattle Plan (Pltf. Exh. 12),[8] CiVIC organized itself as a nonprofit corporation under Washington state law (Pltf. Exh. 40) and established an education committee to draft an effective voluntary racial balancing plan,[9] a legal committee to pursue an injunction against implementation of the mandatory Seattle Plan, and a legislative committee to draft a statewide initiative favoring neigh-

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transfers or (2) incur the inefficiencies of such large-scale voluntary transfers before an inevitable 'mandatory backup' was utilized" (Moberly Affidavit at 9-10).

[8] Members of CiVIC filed an unsuccessful state court suit to enjoin this action by the board. *Roe* v. *Seattle School District No. 1*, King County Superior Court, Cause No. 838291. The board's general counsel reported to the board prior to its approval of the resolution that the plaintiffs "were not quarreling with desegregation and were not trying to prevent desegregation. They were merely quarreling with this specific plan implementation" (Def. Exh. A-99 at Exh. J).

[9] CiVIC's plan, announced in June 1978, called for achievement of racial balance through enhancement of educational programs and adoption of an "open enrollment" policy (Pltf. Exhs. 49, 50).

borhood schools. See Pltf. Exh. 48. In March 1978, the district board formally adopted the Seattle Plan and made arrangements for its implementation at the beginning of the 1978-1979 school year (J.S. App. A-17; Moberly Affidavit at 12).

Contemporaneously with the district's formal adoption of the Seattle Plan, CiVIC launched its campaign for Initiative 350 (Pltf. Exh. 51).[10] Drafted by CiVIC for submission to state voters at the 1978 general election (J.S. App. A-19), Initiative 350 provides that (Wash. Rev. Code Ann. § 28A.26.010 (Cum. Supp. 1981)): "[N]o school board * * * shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place

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[10] CiVIC conducted an intensive multimedia campaign for the Initiative in Seattle and across the state (Pltf. Exhs. 38, 39; Def. Exhs. A-113, A-114). The campaign urged citizens to vote for the Initiative because it would prohibit use of mandatory, nonneighborhood measures to achieve racial balance (Pltf. Exh. 2). The campaign argued that such measures should be prohibited because they (1) increase racial imbalance by inducing " 'white flight' " (J.S. App. A-21); (2) reduce local control by parents over the education of their children (see, *e.g.*, Pltf. Exh. 51 at 21); (3) are promoted by federal bureaucrats unconcerned with such local parental control (*ibid.*); (4) do not measurably improve educational quality for either minority or majority students (*id.* at 28); (5) require large sums of money to be spent on transportation that could be better spent on education (*id.* at 11); and (6) are state financed and thus paid for by citizens statewide (*ibid.*). CiVIC maintained that the Initiative was constitutional because there was no reason to believe that any school authorities in Seattle or Washington had ever intentionally segregated students on the basis of race, and because the Initiative specifically recognized the authority of courts to adjudicate constitutional issues involving schools (see, *e.g.*, Pltf. Exh. 56). CiVIC's materials supporting Initiative 350 stressed that racial imbalance could be eliminated effectively by the use of voluntary methods (see, *e.g.*, *id.* at 3-5). The district court below specifically found that the campaign was conducted in a legal and responsible manner, with no appeals made to racist sentiments (J.S. App. A-22 to A-23). CiVIC "deliberately took steps to avoid race becoming an issue in the campaign * * *" (*id.* at A-23).

of residence * * *." [11] Initiative 350 allows school assignments to be made beyond the nearest or next nearest school only "[i]f a student requires special education, care or guidance"; "[i]f there are health or safety hazards" between the student's residence and the nearest or next nearest school; or if the nearest or next nearest school is "unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities" (*ibid.*). Initiative 350 also expressly provides that it "shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools" (Wash. Rev. Code Ann. § 28A.26.060 (Cum. Supp. 1981)).

The district opened the 1978-1979 school year under the mandatory racial balancing plan (Moberly Affidavit at 14), and on November 7, 1978, Initiative 350 was approved by approximately 66% of the voters statewide (J.S. App. A-22).[12] The Initiative failed in only two

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[11] The Initiative explains that the prohibition on "indirect[]" student assignments beyond the nearest or next nearest school (Wash. Rev. Code Ann. § 28A.26.030 (Cum. Supp. 1981)):

> includes, but is not limited to, implementing, continuing, pursuing, maintaining or operating any plan involving (1) the redefining of attendance zones; (2) feeder schools; (3) the reorganization of the grade structure of the schools; (4) the pairing of schools; (5) the merging of schools; (6) the clustering of schools; or (7) any other combination of grade restructuring, pairing, merging or clustering: PROVIDED, That nothing in this chapter shall limit the authority of any school district to close school facilities.

In legal opinions widely circulated during the campaign (J.S. App. A-21), CiVIC consistently maintained that this section of the initiative does not prohibit the redefinition of attendance zones, pairing, etc. to achieve racial balance, but rather merely requires that after such action, students be assigned to the nearest or next nearest school offering their course of study (Pltf. Exh. 56 at 9-11, 19).

[12] The voters' adoption of Initiative 350 was presaged by various professional public opinion polls. One such poll, conducted for the district in July 1978, found that of those parents who stated that they were aware of the Seattle Plan (approximately 90% of those surveyed), approximately 10% "strongly favored" the plan, 25%

legislative districts, each in Seattle (*ibid.*). In Seattle as a whole, however, the Initiative was approved by approximately 61% of the voters (*ibid.*).[13]

3. On November 30, 1978, the district, together with the Tacoma and Pasco school districts[14] and certain individual plaintiffs, brought this action against the State of Washington and various state officials in the United States District Court for the Western District of Washington, challenging the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth

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"somewhat favored" it, 19% "somewhat opposed" it, and 46% "strongly opposed" it (Def. Exh. A-99 at Exh. G). The principal concern voiced by those opposing the plan was that "children should stay in their own neighborhoods" (*ibid.*). Another poll of parents in the Seattle area found that 65% of minority parents opposed mandatory nonneighborhood student transfers (Def. Exh. A-137). A poll conducted for CiVIC in October 1978 found that approximately 64% of those interviewed would vote in favor of Initiative 350 (Def. Exh. A-114 at Exh. 1). More than half of these persons explained they would do so because they believed children should attend neighborhood schools (*ibid.*).

[13] CiVIC issued a statement on November 8, 1978 calling the Initiative's adoption "a great victory," and emphasizing that Initiative 350 "should *not* in any way be viewed as a vote against integration" but rather as "an affirmation of the concept of the neighborhood school and the right of parents to control their children" (Pltf. Exh. 51 at 29).

[14] Tacoma School District No. 10 and Pasco School District No. 1 are, like the Seattle district, municipal corporations created under the laws of the State of Washington (J.S. App. A-2 to A-3). The Tacoma district has an enrollment of approximately 29,000 students, approximately 20% of whom are either black, Asian, American Indian or Hispanic (*id.* at A-2). The Pasco district has an enrollment of approximately 5,300 students, approximately 27% of whom are either black, Asian, American Indian or Hispanic (*id.* at A-2 to A-3). For the past 15 years, the Tacoma district has employed a voluntary transfer program and more recently school closures and a magnet schools program to alleviate racial imbalance in its schools (*id.* at A-10 to A-14). For the past 16 years, the Pasco district has employed school closures and busing to alleviate racial imbalance in its schools (*id.* at A-9 to A-10).

Amendment (J.S. App. A-1 to A-3, A-6). Numerous parties later intervened in the litigation (*id.* at A-3 to A-6), including CiVIC, which intervened on behalf of the defendants, and the United States, which intervened on behalf of the plaintiffs under 42 U.S.C. 2000h-2.[15]

Following issuance of both a temporary restraining order and a preliminary injunction, the district court entered an order permanently enjoining enforcement of Initiative 350 (A. 8-9). The district court concluded that the Initiative violates the Equal Protection Clause for three reasons (J.S. App. A-27):

> (1) it forbids mandatory student assignments for racial reasons but permits such student assignments for purposes unrelated to race, (2) a racially discriminatory purpose was one of the factors which caused Initiative 350 to be adopted, and (3) the initiative is overly inclusive in that it permits only court-ordered busing of students for racial purposes even though a school board may be under a constitutional duty to do so even in the absence of a court order.

The court of appeals affirmed the district court by a divided vote (J.S. App. B-1 to B-29). Relying on this Court's decision in *Hunter* v. *Erickson*, 393 U.S. 385 (1969), and a three-judge district court opinion in *Lee* v. *Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971), the court of appeals held that Initiative 350 is unconstitutional because it embodies an impermissible legislative classification based on race (J.S. App. B-4). The court stated (*id.* at B-7 to B-8):

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[15] Other plaintiff intervenors alleged that the plaintiff school districts operated unconstitutional dual school systems (J.S. App. B-2). As a result of these allegations, the district court bifurcated the litigation (*ibid.*). The first phase, from which this appeal is taken, was limited to the question of the constitutionality of Initiative 350 (*ibid.*). Second phase issues relating to the allegations of de jure discrimination by the plaintiff school districts were not reached at trial because of the court's ruling on Initiative 350 (*ibid.*).

> Applying the[] principles [of *Hunter* and *Lee*] here, it is manifest that Initiative 350 both creates a constitutionally-suspect racial classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies. Initiative 350 implicitly effects precisely the same classification which was made explicit in *Lee*; the law treats a single purpose for student assignment, racial balancing, differently from all others. Though Initiative 350 creates the differential classification indirectly by omission, there is no basis for distinguishing it as a matter of constitutional law from the explicit classification of *Hunter* and *Lee*.

Although the court of appeals acknowledged that absent existing de jure segregation the school districts themselves could adopt a neighborhood school policy without offending the Equal Protection Clause (J.S. App. B-10), the court concluded that "[t]he interest of the State of Washington in mandating a state-wide policy of neighborhood schools must * * * fall to the paramount interest of the locally elected school boards and the community they represent in promulgating their own educational policy" (*id.* at B-11). The court held the Initiative was unconstitutional because it was not supported by a compelling state interest (*ibid.*), and therefore found it unnecessary to address whether the district court had erred in holding that the Initiative was motivated by a discriminatory purpose and is constitutionally overbroad (*id.* at B-4).

In dissent (J.S. App. B-18 to B-29), Judge Wright stated that the majority's reliance on *Hunter* and *Lee* was misplaced and that Initiative 350 does not create a racial classification by permitting isolated deviations from the neighborhood school policy for safety, health, and special educational purposes. See J.S. App. B-18 to B-24. Judge Wright also reached the other grounds relied on by the district court in invalidating the Initia-

tive. The district court's factual findings on intent, Judge Wright concluded, had insufficient record support to establish that Initiative 350 was motivated by any racially discriminatory intent (*id.* at B-24 to B-27). Judge Wright also rejected the district court's "overbreadth" analysis because Section 6 of the Initiative (Wash. Rev. Code Ann. § 28A.26.060 (Cum. Supp. 1981)) permits departures from the neighborhood school policy when necessary to rectify constitutional violations, and thus does not threaten interference with the vindication of constitutional rights (J.S. App. B-27 to B-29).

SUMMARY OF ARGUMENT

Initiative 350 expresses the policy of the State of Washington in favor of neighborhood schools. Contrary to the conclusion of the courts below, it does not embody an explicit racial classification. Rather, the classification created by the Initiative is between those seeking mandatory nonneighborhood student assignments for reasons of health, safety, or other particularized needs of individual students, and those seeking mandatory nonneighborhood student assignments for any other purpose, including conservation of fiscal resources, balancing of classroom size or alleviation of racial segregation. The Initiative does not split the citizenry into racially identifiable subgroups, and therefore does not classify persons according to race.

Washington's neighborhood school policy "on its face treats Negro and white, Jew and gentile in an identical manner" (*Hunter* v. *Erickson*, 393 U.S. 385, 391 (1969)). In these circumstances, a violation of the Equal Protection Clause may be found only if the neighborhood school policy imposes "special burdens on racial minorities within the governmental process" (*ibid.*) not justified by some compelling state interest (*id.* at 392). Initiative 350 imposes no such special burdens.

Initiative 350 does not radically restructure the political process of Washington, or impermissibly restrict the capability of local school boards to promote racial bal-

ance. The Washington Constitution entrusts formulation of educational policy to the state, and Initiative 350 is an exercise of the state's constitutional responsibilities in this field. The Initiative, furthermore, does not subject state legislation sought by racial groups or other minorities to procedures more burdensome than those applicable to any other type of legislation. Washington has long utilized statewide initiatives to establish public policy, and this "procedure for democratic decisionmaking" does not deny "any person 'the equal protection of the law'" (*James* v. *Valtierra*, 402 U.S. 137, 143 (1971)). Initiative 350, at most, redistributes among governmental units the authority to assign students to schools in local jurisdictions, without making any change in the method for obtaining yet another reallocation of that authority in the future.

Initiative 350 embodies a constitutionally permissible policy favoring neighborhood schools. While the court of appeals recognized that the school districts involved in this litigation could validly adopt a neighborhood school policy, it nevertheless held that imposition of such a policy by a superior decisionmaking authority—the state electorate—was unconstitutional. The court of appeals was wrong. Absent a finding of de jure segregation, decisions concerning the public schools of the State of Washington lie fully within the prerogative of the state. Under Article IX, Section 1 of the state constitution, Washington has complete authority to establish and define educational policy for its public school system. This includes the right to make tradeoff choices between the advantages and disadvantages of neighborhood schools on the one hand, and busing on the other. No principle of federal constitutional law requires that the state, in dividing governmental responsibilities between local and state authority, must leave every—or no—aspect of student assignment policy to local discretion.

Finally, although the district court found that Initiative 350 was unconstitutional because it was enacted for a discriminatory purpose and was overbroad, neither of these grounds justifies invalidating the enactment. A discriminatory purpose in enacting a statute may be found only after a balanced analysis of the factors set out by this Court in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). The district court's analysis of these factors failed to take into account Washington's undisputed history of racial integration, and the fact that the benefits of neighborhood schools flow to minorities as well as the racial majority. Adoption of a neighborhood school policy does not raise per force an inference of racial discrimination; such a policy is entirely consistent with a good faith belief that the advantages for minorities of a neighborhood school system outweigh the advantages for them of a racial balancing system. The district court's finding regarding the overbreadth of the Initiative is similarly flawed. Even assuming that an overbreadth challenge may be properly entertained outside the areas of First Amendment rights, the court erred in rejecting the state Attorney General's clearly constitutional interpretation of the Initiative in favor of an invalidating construction of the measure. Furthermore, there is no real or substantial threat that Initiative 350 will impair efforts to eradicate de jure segregation in Washington, as there is no evidence that any such discrimination exists within the state.

ARGUMENT

Initiative 350 expresses the State of Washington's policy that, except where infeasible for reasons of health and safety, or because of special educational needs or unfit or inadequate conditions, no school children within the state may involuntarily be assigned to attend any school other than that nearest or next nearest to their residences. A policy in favor of neighborhood schools has a long history of acceptance both within and without the State of Washington.[16] And, notwithstanding the failure of such a policy to alleviate racial isolation resulting from residential patterns,[17] utilization of neighborhood schools by a school district has never been held to constitute a per se violation of the Equal Protection Clause. *Austin Independent School District* v. *United States*, 429 U.S. 990, 994 (1976) (Powell, J., concur-

[16] Indeed, a neighborhood school policy is currently adhered to by all Washington school districts except the appellee districts even though enforcement of Initiative 350 is presently enjoined (see App. Br. 4, 15), and the district court concluded that "the Seattle School District has traditionally adhered to a policy of the assignment of children to their neighborhood schools" (J.S. App. A-22 to A-23). The policy is also embodied in the Equal Education Opportunities Act of 1974, wherein Congress declared it to be the policy of the United States that "the neighborhood is the appropriate basis for determining public school assignments." 20 U.S.C. 1701(a)(2). See also 20 U.S.C. 1714(a) ("No court, department, or agency of the United States shall, pursuant to section 1713 of this title, order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student"); *Brown* v. *Califano*, 627 F.2d 1221 (D.C. Cir. 1980); *Morales* v. *Shannon*, 516 F.2d 411 (5th Cir.), cert. denied, 423 U.S. 1034 (1975); *Brinkman* v. *Gilligan*, 518 F.2d 853 (6th Cir.), cert. denied, 423 U.S. 1000 (1975).

[17] It is a "familiar demographic characteristic of this country" for "citizens of common national or ethnic origins to form homogeneous residential patterns in our cities." *Austin Independent School District* v. *United States*, 429 U.S. 990, 994 n.5 (1976) (Powell, J., concurring).

ring); *United States* v. *Texas Education Agency*, 564 F. 2d 162, 168 (5th Cir. 1977) (official discriminatory intent cannot be inferred solely from school board's use of a neighborhood school policy); *Diaz* v. *San Jose Unified School District*, 612 F. 2d 411, 415 (9th Cir. 1979) ("[a] neighborhood school policy is not constitutionally suspect"). See also *NAACP* v. *Lansing Board of Education*, 559 F. 2d 1042, 1049 (6th Cir.), cert. denied, 434 U.S. 997 (1977); *Deal* v. *Cincinnati Board of Education*, 369 F. 2d 55, 60-61 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967). The court of appeals' conclusion that the State of Washington's adoption of a neighborhood school policy violates the Equal Protection Clause is therefore without precedent.

I. Initiative 350 Does Not Classify Persons According to Race

Both the district court and the court of appeals majority held that Initiative 350 creates a constitutionally suspect racial classification because it "treats a single purpose for student assignment, racial balancing, differently from all others" (J.S. App. B-7). This proposition is both factually and analytically unsound. Under the Initiative, mandatory student assignments may deviate from the neighborhood school policy only for certain specified purposes. Mandatory assignments for any purpose not specified—including not only racial balancing but also, for example, numerical balancing of class sizes —are restricted to the schools nearest or next nearest to the students' residences. Accurately viewed, therefore, the Initiative creates two categories of purposes for student assignments, neither of which is restricted to racial balancing.

Initiative 350 does not classify persons according to race in any respect. The classification created by the Initiative is between those seeking mandatory non-neighborhood student assignments for reasons of health, safety, or special educational needs or in response to unfit or inadequate conditions and those seeking manda-

tory nonneighborhood student assignments for any other purpose, including conservation of fiscal resources, balancing of classroom size, or alleviation of racial segregation in the neighborhood schools. While the latter class may not obtain mandatory nonneighborhood student assignments upon the mere approval of the local school board, as can members of the former class, the burden thus created is not imposed along racial lines. There is no basis for a court to infer that even a class limited to those persons seeking mandatory nonneighborhood student assignments to achieve racial balance is racially identifiable. Indeed, as Judge Wright noted in dissent, the "policy question" that lies "at the heart" of Initiative 350—"whether student assignments beyond the next nearest school should be used to overcome *de facto* segregation" (J.S. App. B-21)—simply does not split the citizenry into discrete racial subgroups.[18]

The legislative classification created by Initiative 350 is thus analogous to the classification at issue in *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979). In *Feeney* this Court rejected the contention that a Massachusetts statute granting an absolute lifetime employment preference to veterans classified persons on the basis of sex. While noting that the veteran prefer-

[18] The racial heterogeniety of the class allegedly disadvantaged by Initiative 350 contrasts rather sharply with the racial makeup of the disadvantaged class in *Hunter* v. *Erickson*, *supra*. Although it could be argued that the classification created by the city charter amendment in *Hunter* was not "racial" because advocates of fair housing legislation are not racially identifiable, the fact remains that the special political obstacle created to block future fair housing ordinances in *Hunter* operated to the peculiar disadvantage of minorities. As the Court specifically noted in *Hunter*, the racial "majority needs no protection against discrimination" in housing opportunities (393 U.S. at 391). By contrast, rescission of a racial balancing program in favor of a neighborhood school policy like the one embodied in Initiative 350 does not work exclusively to the disadvantage of any racial group. The perceived advantages of neighborhood schools—*i.e.*, increased community support and input, enhanced safety, reduced costs, and improved home-school relations (J.S. App. A-23)—flow to both minority and nonminority students.

ence statute "exclude[d] significant numbers of women from preferred state jobs," the Court concluded (442 U.S. at 275):

> [T]his is not a law that can plausibly be explained only as a gender-based classification. Indeed, it is not a law that can rationally be explained on that ground. Veteran status is not uniquely male. Although few women benefit from the preference, the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and all nonveterans—male as well as female—are placed at a disadvantage. Too many men are affected by [the veterans' preference statute] to permit the inference that the statute is but a pretext for preferring men over women.

To paraphrase the *Feeney* court, adoption of a neighborhood school policy cannot be explained solely on racial grounds. Preference for neighborhood schools is not uniquely limited to the racial majority. Conversely, preference for mandatory busing to achieve racial balance is not uniquely limited to racial minorities. To the contrary, significant numbers of both classes lie on either side of the mandatory busing controversy. Too many minorities are opposed to the implementation of widespread mandatory busing and the consequent abandonment of the advantages of neighborhood schools to permit the inference that establishment of a neighborhood school policy is but a pretext for overriding the constitutional prerogatives of the racial minority.[19] Initiative 350, therefore, clearly does not classify persons according to race. Cf. *Gordon* v. *Lance*, 403 U.S. 1, 5 (1971) (state constitutional provision limiting bonded indebtedness of the state does not violate the Equal Protection Clause as Court could discern "no *independently identifiable* group or category that favors bonded indebtedness over other forms of financing") (emphasis added); *James* v. *Valtierra*, 402 U.S. 137, 141 (1971) (holding, in contrast to *Hunter* v. *Erickson*, *supra*, that a state-required referen-

[19] See notes 12, *supra*, & 42, *infra*.

dum on all low-rent public housing projects is not a " 'distinction based on race' ").[20]

II. The State of Washington's Adoption of a Neighborhood School Policy Imposes no Special Burden on Racial Minorities Within the Governmental Process

1. A neighborhood school policy that, like the State of Washington's, "treats Negro and white, Jew and gentile in an identical manner" (*Hunter* v. *Erickson*, 393 U.S. 385, 391 (1969)), violates the proscription of the Fourteenth Amendment only where it "places special burdens on racial minorities within the governmental process" (*ibid.*) that are not justified by some compelling state interest (*id.* at 392). The State of Washington's adoption of Initiative 350 imposes no special burden upon minorities within the state's governmental process.

In *Hunter* v. *Erickson*, *supra*, this Court upheld a constitutional challenge to a city charter amendment that required city housing ordinances prohibiting invidious discrimination to be approved at a regular general election, while ordinances regulating housing on other grounds became effective merely upon approval by the city council.[21] The Court found that the amendment violated the

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[20] A race-neutral law violates the equal protection clause only if it has a disproportionately adverse impact upon a racial minority that can be traced to purposeful discrimination. *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 273-274. See also *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980); *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington* v. *Davis*, 426 U.S. 229 (1976). Because the court of appeals majority concluded that Initiative 350 classifies persons on the basis of race, it did not consider whether enactment of the Initiative was motivated by purposeful discrimination. If, as the United States contends, Initiative 350 does not establish a racial classification, the question whether the adoption of the Initiative reflected a discriminatory purpose gains substantial importance in the ultimate resolution of this litigation. See Point IV, *infra*.

[21] The amendment also differentiated fair housing ordinances from other ordinances in at least two other respects. The referendum required under the amendment could be obtained only through a petition signed by 10% of the city's voters; other

Equal Protection Clause because it expressly targeted ordinances designed to eliminate racial discrimination in housing and subjected them to a special legislative process that "obviously made it substantially more difficult to secure [their] enactment" (393 U.S. at 390). The Court emphasized that the "mere repeal of an existing ordinance" would not violate the Fourteenth Amendment (*id.* at 390 n.5), but concluded that the amendment's "required * * * approval of the electors before any future [fair housing] ordinance could take effect" (*id.* at 390) visited a "special burden[] on racial minorities within the governmental process" (*id.* at 391) unjustified by a compelling state interest (*id.* at 392). "[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size" (*id.* at 393). The Court's opinion emphasized that only minorities need the protection of a fair housing law (see note 18, *supra*).

In *Lee* v. *Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971), a three-judge district court applied *Hunter* to invalidate a New York statute explicitly prohibiting race-conscious student assignment by appointed, but not by elected school boards. The statute created "a single exception to the broad supervisory powers the [appointed] state Commissioner of Education exercises over local public education" (318 F. Supp. at 718), and unambiguously applied to "all efforts to achieve racial balance, including such efforts by a school district subject to a pre-existing order to eliminate segregation in its schools" (*id.* at 715). The district court concluded that the statute "structure[d] the internal governmental process in a manner not founded on neutral principles,"

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ordinances could be initiated on petition of seven percent of the voters (393 U.S. at 390). Further, the amendment specifically provided that referendums on fair housing ordinances could be conducted only at regular or general elections, while an expedited special election procedure was ordinarily available for other referendums (*ibid.*).

and thus "operate[d] to disadvantage a minority, a racial minority, in the political process" (*id.* at 720). The statute accordingly was found to deny plaintiffs equal protection of the law.

2. The majority of the court of appeals relied on *Hunter* and *Lee* to conclude that Initiative 350 places special burdens on racial minorities within the political process and therefore violates the Equal Protection Clause. Initiative 350 imposes these burdens, in the court of appeals' view, by "restructur[ing] the state's political and administrative process so as to *remove* from local school boards their existing authority, and in large part their capability, to enact programs designed to desegregate the schools" (J.S. App. B-11) (emphasis in original) (footnote omitted). As Judge Wright pointed out in dissent, however, *Hunter* and *Lee* are not controlling here (J.S. App. B-18 to B-19). The court erred in concluding that Initiative 350 either "radically restructures the political process of Washington" (J.S. App. B-7) or impermissibly restricts the capability of local school boards to promote racial balance. The Initiative merely limits the discretion of local school districts to draw school attendance zones through an exercise of policymaking authority at the superior, statewide level. It simply does not alter the legislative process in the State of Washington in a way analogous to the measures at issue in *Hunter* v. *Erickson*, *supra*, and *Lee* v. *Nyquist*, *supra*.

a. Contrary to the conclusion of the court of appeals, Initiative 350 does not result in any usurpation of "traditional local authority over local school board educational policies" (J.S. App. B-7). In the State of Washington, education is emphatically the responsibility of the state, not the local boards of education. Article IX, Section 1 of the state constitution states that "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex." See also Article IX, Section 2 ("[t]he legislature shall provide for a general and uniform sys-

tem of public schools"). The Washington Supreme Court has held that the Article IX, Section 1 guarantee of racial equality "does not merely seek to broadly declare policy, explain goals, or designate objectives to be accomplished. It is declarative of a constitutionally imposed *duty*." *Seattle School District No. 1* v. *Washington*, 90 Wash. 2d 476, 499, 585 P.2d 71, 85 (1978) (emphasis in original). In accordance with this duty, the state legislature has an affirmative, judicially enforceable obligation both to define and fully provide "a basic program of education in a 'general and uniform system of public schools.' " 90 Wash. 2d at 522, 585 P.2d at 97.

The state legislature, in fulfillment of this obligation, has established local school districts and has allowed the elected boards of these districts discretion in limited areas of educational administration. However, under state law and practice, these boards do not define and implement local and autonomous educational policies. They act as agents of the state, effectuating at the local level policies announced by the state legislature and explicated by the state superintendent of public instruction and state board of education. See *Moses Lake School District No. 161* v. *Big Bend Community College*, 81 Wash. 2d 551, 556 (1972). See generally Wash. Rev. Code Ann. § 28A.02.020 (Cum. Supp. 1981) (organization of state school system); Wash. Rev. Code Ann. § 28A.03.030 (Cum. Supp. 1981) (powers and duties of superintendent of public instruction); Wash. Rev. Code Ann. § 28A.04.120 (Cum. Supp. 1981) (powers and duties of state board of education). Statewide limitations on local discretion are not uncommon. Whether by mandatory regulations or conditional financing, the state has deeply involved itself in virtually every area of local educational administration. See, *e.g.*, Wash. Admin. Code 392-143-065 (regulating types of tires permissible on local school buses). See generally Wash. Rev. Code Ann., tit. 28A (1970); Wash. Admin. Code, tits. 180, 392. In areas where the state has allowed some local discretion, *e.g.*, in the setting of educational curricula, this discretion typically has been narrowly circumscribed.

See, *e.g.*, Wash Rev. Code Ann. § 28A.58.754(3) (Cum. Supp. 1981) (establishing mandatory statewide "total program hour requirements" and "minimum course mix percentages" for local school districts, but allowing deviations of "up to five percentage points above or below" the minimums "[i]n order to provide flexibility to the local school districts").

As with all matters of educational policy, state involvement in the racially sensitive aspects of local educational administration has been substantial. The state has never abdicated its constitutional policymaking responsibility in this area. The state has long subjected school officials to statewide nondiscrimination requirements,[22] and has long both promoted and regulated local efforts to eliminate racial imbalance. At least since 1970 (see J.S. App. A-12, finding 5.8), the alleviation of racial imbalance in local school districts has been an expressly established policy of the state. The state, furthermore, has regularly enacted laws and promulgated regulations designed to give the policy practical effect.[23] Indeed, the Washington

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[22] *E.g.*, Wash. Rev. Code Ann. § 28A.02.050 (Cum. Supp. 1981) (incorporating into state educational code state prohibition of employment discrimination); Wash. Rev. Code Ann. § 28A.58.701 (Cum. Supp. 1981) (prohibiting discrimination in the granting of student aid); Wash. Rev. Code Ann. § 28A.87.220 (Cum. Supp. 1981) (incorporating into state education code state provision of criminal penalties for violations of civil rights). Cf. Wash. Op. Att'y Gen. No. 1, at 11 (1975) (state superintendent of public instruction authorized by state law to require local school districts to formulate and implement affirmative action requirements). See also Wash. Rev. Code Ann. § 28A.85.020 (Cum. Supp. 1981) (state superintendent of public instruction directed to develop statewide regulations and guidelines for the elimination of sex discrimination).

[23] See, *e.g.*, Wash. Rev. Code Ann. § 28A.58.245 (Cum. Supp. 1981) directing state superintendent of public instruction to develop rules and regulations for the implementation of inter-district, voluntary programs deemed necessary by the superintendent to improve racial balance within and among school districts) (enacted 1969); Wash. Rev. Code Ann. § 28A.41.250 (Cum. Supp. 1981) (directing the state superintendent to devise a statewide plan to assist school districts in developing programs for the relief of children suffering from racial isolation) (enacted 1974); Wash. Admin. Code 180-30-040 (conditioning approval of construction grants to school districts on a

Supreme Court has held that in implementing a local racial balancing plan, a school district is simply "effectuating, at the local level, a policy announced by the legislature." *Citizens Against Mandatory Bussing* v. *Palmason*, 80 Wash. 2d 445, 448, 495 P.2d 657, 660 (1972).[24]

In this context, it is simply incorrect to speak, as did the court of appeals, of "a state-wide majority * * * usurp[ing] traditional local authority over local school board educational policies" (J.S. App. B-7), or to characterize as "paramount" any local interest in the promulgation of educational policy (*id.* at B-11). Indeed, in litigation challenging a 1971 mandatory nonneighborhood racial balancing plan implemented in the Seattle School District's middle grades, the State Supreme Court held that local referendums may not be used to overturn local desegregation plans because local voters may not "interfere in the management of the state's school system." *Citizens Against Mandatory Bussing* v. *Palmason*, *supra*, 80 Wash. 2d at 450.[25] The limitation on the use of mandatory measures for achieving racial balance contained in Initiative 350 does not restructure the educational policymaking process of the state of Washington in some unusual or special fashion. Unlike the situation in *Lee* v. *Nyquist*, *supra*, Initiative 350 does not represent a "single exception" (318 F. Supp. at 718) to the other-

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determination by the state superintendent that the proposed construction would not create or aggravate racial imbalance within the districts) (promulgated 1969).

[24] The state, moreover, has often indicated in some detail how this statewide policy is to be implemented by local districts. It has, for example, defined the degree of racial imbalance that local school districts should attempt to eliminate, and has required that local racial balancing plans be submitted to the state for approval prior to implementation. See, *e.g.*, *Citizens Against Mandatory Bussing* v. *Palmason*, *supra*, 80 Wash. 2d at 449 n.5, 495 P.2d at 661; Wash. Op. Att'y. Gen. No. 55, Part III (1965-1966) (conditioning state financing of racial balancing plans on approval by the state superintendent of public instruction).

[25] As Judge Wright noted in dissent, "[i]t is ironic that a federal court would now hold that the state itself may not interfere in its own school system" (J.S. App. B-24).

wise broad authority of local districts over educational matters. In Washington, statewide limitations on the exercise of local discretion are the norm. The court of appeals erred in concluding otherwise.

b. The court of appeals also erred in concluding that Initiative 350 burdens racial minorities by impermissibly restricting the capability of local school districts to promote racial balance (J.S. App. B-11). In contrast to the situation in *Lee* v. *Nyquist*, *supra*, where the statute clearly prohibited "all efforts to achieve racial balance" (318 F. Supp. at 715), Initiative 350 is not designed to prevent increased racial mixing in public schools. The Initiative does not prohibit all mandatory student assignments for racial reasons, but merely limits such mandatory assignments to those schools nearest or next nearest to the student's home. In addition, the Initiative does not limit in any manner the use of voluntary programs or school closures designed to promote racial balance. In short, the Initiative does not deny any student the right to attend a fully integrated school.

The Initiative, moreover, will not interfere with the efforts of individual school districts to eliminate de jure segregation. Unlike the statute in *Lee* v. *Nyquist*, *supra*, which blocked desegregation efforts even by "a school district subject to a pre-existing order to eliminate segregation in its schools" (318 F. Supp. at 715), Initiative 350 clearly permits Washington school districts to make racially conscious student assignments pursuant to a court finding of unconstitutional segregation.[26] Cf. *North Carolina Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971) (anti-busing law unconstitutional because it would "obstruct the remedies granted by the District Court" to eliminate existing de jure segregation).[27] The

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[26] The Initiative expressly provides that it "shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools." Wash. Rev. Code Ann. § 28A.26.060 (Cum. Supp. 1981).

[27] The statute at issue in *Lee* v. *Nyquist*, *supra*, clearly violated the rule established in *North Carolina Board of Education* v. *Swann*, *supra*, as it unambiguously blocked all efforts to dismantle de jure

Initiative, furthermore, has been consistently interpreted by the State Attorney General—the official charged with enforcing the Initiative—as permitting local officials to make race-conscious student assignments to remedy de jure segregation (App. Br. 37-39).[28] Initiative 350,

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segregation and therefore "operate[d] to * * * impede the disestablishing of a dual school system" (402 U.S. at 45). This Court's summary affirmance of *Lee* was announced approximately two weeks after the Court's decision in *Swann*. *Nyquist* v. *Lee*, 402 U.S. 935 (1971). Since the *Swann* decision fully justified the summary affirmance in *Lee*, it is implausible to attribute any novel, unexpressed further significance to that summary disposition. See *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (summary affirmance does not constitute an endorsement of the lower court's reasoning); *Fusari* v. *Steinberg*, 419 U.S. 379, 391-392 (1975) (Burger C.J., concurring) (same). Accordingly, this Court's summary affirmance in *Lee* provided no support for the court of appeals' decision here.

[28] In the absence of a state court decision construing Initiative 350, the state Attorney General's interpretation is the most authoritative available construction of the Initiative. Although this interpretation is not "binding on the courts and legislature of the State," this Court has assumed that representations of the Attorney General of the State of Washington "are authoritative within [the state's] executive branch." *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 694 (1979). Inasmuch as it is the state's executive branch that would enforce Initiative 350, the attorney general's representation that the Initiative would not be enforced in such a manner as to prevent dismantling of de jure segregation (if any exists in Washington and cannot adequately be remedied by other means) is entitled to substantial deference. Absent a state court interpretation, the Washington Attorney General's interpretation clearly prevails over that of the district court. See, *e.g.*, *Lynch* v. *Overholser*, 369 U.S. 705, 710-711 (1962).

Moreover, even if the district court's interpretation of Initiative 350 were correct, no decision of this Court holds that a state is constitutionally prohibited from requiring that the threshold legal question—whether existing racial segregation in the district is unconstitutional—be *judicially* decided before it permits local school

therefore, does not hinder the ability of school districts or school officials within the State of Washington to conform their conduct fully to federal constitutional requirements. The courts below erred in concluding otherwise.

c. Moreover, Initiative 350, unlike the challenged enactment in *Hunter* v. *Erickson*, *supra*, does not subject any future school attendance zone referendum sought by racial groups or other minorities to procedures more burdensome than those that were applicable to Initiative 350 or that currently apply to any other issue to be brought before the voters of Washington. The constitutional vice in *Hunter* v. *Erickson* was not that the Akron voters utilized a referendum to repeal a fair housing law (393 U.S. at 390 n.5), but that the resulting amendment to the city charter erected a special political obstacle to block all future fair housing ordinances (*id.* at 391). The city charter amendment challenged in *Hunter* required approval of all fair housing ordinances at a regular general election, but did not require such approval for any other category of municipal ordinance; it therefore was not "grounded in neutral principle" (*id.*

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boards (the subordinate political subdivisions created by the state to implement state educational policy) to depart from the statewide neighborhood school policy and to employ remedial race-conscious student assignments. See *Holt Civic Club* v. *Tuscaloosa*, 439 U.S. 60, 71 (1978); cf. *Hughes* v. *Superior Court*, 339 U.S. 460, 467 (1950) ("the Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches"); *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect of some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State"); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 255 (Warren, C.J., announcing judgment), 256-257 (Frankfurter, J., concurring), 268 (1957) (Clark, J., dissenting).

at 395) (Harlan, J., concurring). In contrast, Initiative 350 erects no political obstacles to future modification of state school attendance zone policy, and is the result of a procedure "which is grounded in neutral principle, * * * a general referendum" (393 U.S. at 395) (Harlan, J., concurring).

In enacting Initiative 350, the State of Washington plainly did not create a special political process for the consideration of racial issues. All the state did was enact what in Washington is commonplace—a statewide limitation on the discretion of local school officials. The fact that the state's voters utilized a general referendum as the means of effectuating this state educational policy is also unexceptionable, as "[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *James* v. *Valtierra*, 402 U.S. 137, 141 (1971). If local school districts and other groups oppose Initiative 350, the same general referendum procedure is available to them on exactly the same terms as it was to the proponents of Initiative 350. General referendums "do not violate the Equal Protection Clause simply because they occasionally operate to disadvantage [minority] political interests. If a governmental institution is to be fair, one group cannot always be expected to win. If * * * [pro-minority] legislation [is] defeated at a referendum [minorities] * * * undoubtedly lose an important political battle, but they [are] not thereby * * * denied equal protection." *Hunter* v. *Erickson*, *supra*, 393 U.S. at 394 (Harlan, J., concurring).

In *James* v. *Valtierra*, *supra*, 402 U.S. at 139, the Court declined to extend *Hunter* v. *Erickson*, *supra*, to cover an important political battle lost by proponents of low-cost public housing. In *James*, this Court rejected the claim that a newly adopted California state constitutional amendment denied proponents of low-cost public housing equal protection, even though the amendment required referendum approval of all such housing projects developed or acquired by a state public body. Although the mandatory referendum requirement undoubtedly hindered the efforts of those seeking low-rent public

housing (402 U.S. at 12), a referendum requirement was not considered to be a "special burden" within the meaning of *Hunter* v. *Erickson*, and the court therefore declined to find that it constituted a denial of equal protection.

As in *James*, the supporters of mandatory nonneighborhood student assignments in Washington must overcome the results of a public referendum to achieve their goals. But this "disadvantage[]" (402 U.S. at 142) does not deny equal protection because supporters of mandatory nonneighborhood student assignments have not been singled out and subjected to a referendum process "while no other group must face that obstacle" (*ibid.*).[29] Washington long has utilized a referendum process for many issues of general public concern.[30] "This procedure for democratic decisionmaking does not violate the constitutional command that no State shall deny to any person 'the equal protection of the laws'" (*James*, *supra*, 402 U.S. at 143).

Sensing that the state's utilization of a non-discriminatory referendum to establish educational policy does not by itself impose any special burden upon minorities within the governmental process, the court of appeals reasoned that the statewide nature of the referendum process violated the Fourteenth Amendment by "effectively

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[29] In *James*, the Court noted that California required referendums for approval of state constitutional amendments, issuance of general obligation bonds by local governments, and certain municipal annexations (402 U.S. at 142).

[30] The initiative and referendum process is widely used in Washington to enact law and shape public policy. See J.S. App. B-27; Comment, *Judicial Review of Laws Enacted by Popular Vote*, 55 Wash. L. Rev. 175, 179 n.29 (1979). The voters of the state may enact by means of an initiative any law that could be adopted by the state legislature (Wash. Const. Art. II, § 1). Once passed by the electorate, an initiative cannot be repealed by the state legislature for two years, although it can be amended by a two-thirds majority vote of both houses of the state legislature (*id.* at § 41). After two years, the initiative may be amended or repealed by the legislature in the same manner as any other statute (*ibid.*).

disenfranchis[ing] the voters of the local school districts with respect to local educational matters" (J.S. App. B-11). Aside from the fact that this "disenfranchisement" rationale overlooks the reality (noted by Judge Wright in dissent) "that 60% of the voters in Seattle voted in favor of the initiative" (J.S. App. B-24), the preceding discussion of state law shows that local voters in Washington have no more than a rescindable delegation of power from the state to affect educational policy in those few areas left to local discretion. Once the state has prescribed a uniform educational policy, local preferences entirely give way. Initiative 350, like other state-promulgated educational policies, restricts and directs local efforts to shape the character of local schools. But the resulting restriction or "disenfranchisement" of local voters stems not from Initiative 350, but from the state constitution. Thus, the "burden" placed upon local voters by the educational policy embodied in Initiative 350 is indistinguishable from the burdens imposed upon other groups by countless other restrictive state educational policies. The restriction imposed by the Initiative, therefore, unlike the restriction at issue in *Hunter* cannot accurately be characterized as unusual or special.

The effect of Initiative 350 is to restrict the discretion of local school boards to assign students beyond the nearest or next nearest school to their homes. Where student assignment was once a matter left to local discretion, it is now a matter of uniform state policy. But not only was this modification of state policy not the result of any unusual political procedure, the current state policy is not insulated from reconsideration or modification by a special political barrier. Initiative 350, at most, merely redistributes among governmental units the authority to assign students to schools in local jurisdictions, without making any change in the method for obtaining yet another reallocation of that authority. It places no "burdens on racial minorities within the governmental process" that are in any sense "special" (*Hunter* v. *Erickson, supra,* 393 U.S. at 391). In these

circumstances, the court of appeals erred in concluding that the Initiative impermissibly infringes appellees' Fourteenth Amendment rights.

III. Initiative 350 Represents a Constitutionally Permissible Policy Decision. The Fact that the State, Rather Than the Local School District, Made the Final Policy Selection is of no Federal Constitutional Significance

Apart from the preceding analysis, there is another fundamental reason why Initiative 350 does not violate the proscription of the Equal Protection Clause. Initiative 350 merely rescinds an educational policy that is not itself required by the Constitution, and replaces it with another constitutionally permissible policy. The only real question presented by the case, therefore, is whether the state can adopt a policy favoring neighborhood schools which supersedes the contrary policy of some of its constituent local school districts. The United States submits that it can.

The race-conscious nonneighborhood student assignment plan adopted by the Seattle School District reflects the district's judgment that "in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 16 (1971). But, regardless of whether utilization of that plan is within the district's "broad power to formulate and implement educational policy" (*ibid.*), it clearly is not mandated by the Fourteenth Amendment. "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole" (*id.* at 24). Similarly, because there has been no finding of unlawful segregation in Washington schools, and in Seattle in particular, Initiative 350's policy favoring neighborhood schools is well within the range of constitutionally permissible policy choices available to

the district.[31] The question thus becomes whether Washington's replacement of a racial balancing plan with a constitutionally permissible policy somehow offends the Equal Protection Clause.

This Court has long recognized that "mere repeal" of existing ordinances or legislation dealing with racial matters does not, by itself, offend the Equal Protection Clause. *Hunter* v. *Erickson*, *supra*, 393 U.S. at 390 n.5. Absent a preexisting constitutional duty (*Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 414 (1977))[32] or conduct on the part of the state that "significantly encourage[s] and involve[s] the State in private discriminations" (*Reitman* v. *Mulkey*, 387 U.S. 369, 381 (1967)),[33] the Fourteenth Amendment does not establish "an automatic constitutional barrier to the repeal

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[31] "All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes." *Swann* v. *Charlotte-Mecklenberg Board of Education*, *supra*, 402 U.S. at 28.

[32] In *Dayton Board of Education* v. *Brinkman*, *supra*, this Court concluded that whether a school board's rescission of prior resolutions calling for remedial racial balancing measures violated the Fourteenth Amendment was "inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took. [Citations omitted.] * * * If the Board was under such a duty, then the rescission becomes a part of the cumulative violation, and it is not necessary to ascertain whether the rescission *ipso facto* is an independent violation of the Constitution." 433 U.S. at 414 (quoting *Brinkman* v. *Gilligan*, 503 F.2d 684, 697 (6th Cir. 1974)).

[33] In *Reitman* v. *Mulkey*, *supra*, this Court affirmed the holding of the California Supreme Court that a recent amendment to the state constitution guaranteeing a private right to discriminate in the sale or rental of real property violated the Equal Protection Clause. Central to this Court's opinion was a finding by the California Supreme Court that the state constitutional amendment "significantly encourage[d] and involve[d] the state in private discriminations" (387 U.S. at 381). The Court specifically noted that the Fourteenth Amendment would not invalidate mere repeal "of an existing law prohibiting racial discriminations in housing," nor would it prevent a state from putting "in statutory form an existing policy of neutrality with respect to private discriminations" (*id.* at 376).

of an existing law" impacting on racial issues (*id.* at 376). Analyzed under these principles, is it clear that adoption of Initiative 350 does not offend the Equal Protection Clause.

No court—state or federal—has ever determined that any Washington school district has been guilty of unlawful segregation. On the contrary, the record in this case demonstrates that the Seattle School District, as well as the other two plaintiff districts, have consistently and diligently sought to promote not merely racial integration but racial balance within their schools (see notes 2, 4, 5, 6, 14, *supra*). None of the plaintiff school districts, therefore, is constitutionally compelled to adopt racial balancing techniques (*Dayton Board of Education* v. *Brinkman*, *supra*, 433 U.S. at 414, 420). Nor is any of them precluded from adopting a neighborhood school policy, such as the one embodied in Initiative 350, since there has been no finding that such a policy by itself will significantly encourage and promote unlawful segregation. Cf. *Reitman* v. *Mulkey*, *supra*, 387 U.S. at 381. See also *Austin Independent School District* v. *United States*, *supra*, 429 U.S. at 994 (Powell, J., concurring). The Equal Protection Clause, therefore, places no significant constraints on the state's adoption of the educational policy option at issue in this litigation—neighborhood schools.

The court of appeals recognized the limited impact of the Equal Protection Clause in this case when it acknowledged that "we would be faced with a quite different issue" (J.S. App. B-10 n.8) had the school districts themselves rescinded their mandatory plans in favor of neighborhood schools. The court realized that the constitutionality of a neighborhood school policy in those circumstances would hinge upon whether the school districts were under a preexisting duty to dismantle a dual school system (*ibid.*). But although the court concluded the school districts could adopt a neighborhood school policy absent de jure segregation (*ibid.*), it nevertheless held that such a policy could not be imposed upon the districts by a superior decisionmaking authority—the state elector-

ate (*id.* at B-11). The court of appeals clearly erred in reaching this conclusion.

This case does not involve constitutionally proscribed racial discrimination, because there has been none. At issue, rather, is whether the State may adopt a policy that the court of appeals acknowledges the school board could have adopted. Thus, how the State of Washington distributes its governmental authority concerning school matters among the various components that comprise state government controls the disposition of this case, for in the absence of a constitutional violation, decisions concerning the public schools of the State of Washington lie entirely within the prerogative of the State.[34] Furthermore, how the state's decisionmaking authority is allocated among the various units of state government is a question for state, not federal, law.

The court of appeals' conclusion that the state is somehow disabled from establishing a student assignment policy ignores the state's constitutional obligation to provide "a basic program of education in a 'general and uniform *system of public schools*' " (*Seattle School District No. 1* v. *Washington*, *supra*, 90 Wash. 2d at 499, 522, 585 P.2d at 85 (emphasis added)). Under Article IX, section 1 of the state constitution,[35] Washington has full authority to establish and define educational policy for its public school system.

The appellee school districts apparently contend, and the court of appeals agreed (J.S. App. B-11), that Initiative 350 impermissibly constricts their discretion in student assignment matters. However, the "discretion" the districts claim the Initiative infringes existed merely because the state chose to delegate that discretion to the districts. Indeed, instead of permitting local districts

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[34] "[I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation." *Swann* v. *Charlotte-Mecklenberg Board of Education*, *supra*, 402 U.S. at 16.

[35] "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex" (Wash. Const. Art. IX, § 1).

broad discretion in assigning students to schools, the state could have initially required that all students be assigned to the nearest or next nearest school to their homes. The state could subsequently have granted local districts the limited discretion to deviate from this policy if required for reasons of health, safety, unfit conditions, or the particularized needs of individual students. While this procedure would be viewed as expansion rather than contraction of local discretion, the end result is the same as that achieved by Initiative 350. Thus, the school districts' complaint that Initiative 350 unduly constricts their authority is unavailing. Whether a neighborhood school policy is achieved by expanding or restricting local discretion, and whatever the time sequence in which the expansion or restriction is accomplished, the respective rights of the state and local districts remain the same. The power of the state to order its internal govermental processes is unquestionable; the local districts cannot claim they possess authority superior to the state that created them. States have "extraordinarily wide latitude * * * in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club* v. *Tuscaloosa*, 439 U.S. 60, 71 (1978). And nothing in *Hunter* v. *Erickson*, *supra*, or in any federal constitutional principle restricts the state to a choice of either delegating every aspect of student assignment policy to local discretion or retaining every aspect for its own decisionmaking. *Hunter* cannot properly be extended to intrude so deeply into the ability of the states to order the division of government responsibilities between local and statewide authorities.

The court of appeals accordingly erred in concluding that the state was prohibited by the federal constitution from preempting the educational policy decisions of a subordinate unit of state government. In the words of Mr. Justice Cardozo, a political subdivision, "created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Williams* v. *Mayor and City Council of Bal-*

timore, 289 U.S. 36, 40 (1933).[36] Under the state constitution, the state has full authority to weigh and decide between the competing policies of neighborhood schools and homogeneous racial balance. Whether or not the schools of the State of Washington will have finely tuned racial homogeneity or a neighborhood identity, or some combination of both, remains a question for ultimate resolution by the state. So long as the state avoids the dual school system proscription of the Fourteenth Amendment, it remains free to make the tradeoff choices between the advantages and disadvantages of neighborhood schools on the one hand, and extensive mandatory busing on the other.[37]

IV. The Other Grounds Relied Upon By The District Court Do Not Support The Conclusion That Initiative 350 Is Unconstitutional

Because the court of appeals majority determined that Initiative 350 creates a presumptively invalid racial classification, it did not reach the alternative grounds relied upon by the district court to find the Initiative unconstitutional: that it was motivated by an intent to discriminate against racial minorities and is imper-

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[36] See also *Newark* v. *New Jersey*, 262 U.S. 192, 196 (1923) ("The City cannot invoke the protection of the Fourteenth Amendment against the State"); *Hunter* v. *Pittsburgh*, 207 U.S. 161, 178 (1907) ("The number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. * * * The State, therefore, at its pleasure may modify or withdraw all such powers * * *"); *Barnes* v. *District of Columbia*, 91 U.S. 540, 544-545 (1875) (A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. However, great or small its sphere of action, it remains the creature of the State, exercising and holding powers and privileges subject to the sovereign will).

[37] As Judge Wright noted in dissent, "[i]n the absence of a duty to desegregate, I find no constitutional barrier to the voters' adoption of a neighborhood schools policy. Although the choice made by the voters may have been controversial it was not one they were precluded from making" (J.S. App. B-18).

missibly overbroad. Although this Court need not address these grounds not considered by the court of appeals, *Pennhurst State School and Hospital* v. *Halderman*, No. 79-1404 (Apr. 20, 1981), slip op. 23-27; *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 397-398 (1971), they do not in any event support a finding that Initiative 350 is unconstitutional.[38]

1. The district court found that Initiative 350 is unconstitutional because invidious discrimination "was at least one motivating factor" in its adoption (J.S. App. A-35). In reaching this conclusion, the district court relied on the multiple-factor analysis set forth by this Court in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-268 (1977). Upon examination, however, the factors set forth in *Arlington Heights* do not support the conclusion that Initiative 350 is animated by an invidious intent.

The district court's intent analysis purportedly probed the impact of the Initiative, its historical background, the specific sequence of events leading to its enactment, and any departures from substantive or procedural norms that occurred in the process. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 265-268. The district court first reasoned that Initiative 350 would have a racially disproportionate impact simply because it mandated a neighborhood school policy. The state's voters "were well aware that the passage of Initiative 350 would terminate the efforts which had been taken by school boards of the state to balance schools racially by the mandatory busing of students.

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[38] If, as we have argued (Point I, *supra*), Initiative 350 does not establish a racial classification, the intent issue becomes critical to the ultimate resolution of the case. See, *e.g.*, *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. 256. Some guidance on the intent issue from this Court, therefore, would be appropriate even though it was not addressed by the court of appeals. See, *e.g.*, *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). See also note 20, *supra*; *Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980); *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 583 n.24 (1979).

Given the segregated housing patterns of the three plaintiff school districts, the termination of those efforts could only result in racially-imbalanced schools in those districts and a disproportionate impact upon minority students" (J.S. App. A-33). The court next found that the historical background and specific events leading up to the Initiative's adoption supported an inference of discriminatory intent "inasmuch as it was conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments" (*id.* at A-34). The court finally held that adoption of Initiative 350 was a "marked departure from the procedural norm" and a "clear[] * * * departure from prior state practice" in that "an administrative decision of a subordinate local unit of government, the Seattle School Board, was overridden in a statewide initiative * * *" (*id.* at A-35). All these factors, the court wrote, led to the conclusion that "a racially discriminatory intent or purpose was at least one motivating factor in the adoption of the initiative" (*ibid.*).

Contrary to the conclusion of the district court, however, these factors do not support an inference of discriminatory intent. At most, they evidence that the voters of Washington made an informed policy choice that "may have been controversial" but was "not one they were precluded from making" (J.S. App. B-18) (Wright, J., dissenting).

Although termination of mandatory nonneighborhood student transfers may result, as the district court noted, in some increased racial isolation due to residential patterns, this "impact" of a neighborhood school policy has never been found sufficient in itself to invalidate such a policy on equal protection grounds.[39] See, *e.g.*, *Austin In-*

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[39] Furthermore, the district court's assumption that racial imbalance inevitably impacts minority student education adversely is far from a "certainty" (J.S. App. B-26) (Wright, J., dissenting). "The underlying sociological and political assumptions equating quality education with integration have been questioned" (*id.* at

dependent School District v. *United States*, 429 U.S. 990 (1976); *id.* at 991 n.1 (Powell, J., joined by the Chief Justice and Rehnquist, J., concurring); *United States* v. *Texas Education Agency*, 564 F.2d 162, 168 (5th Cir. 1977) (official discriminatory intent cannot be inferred solely from school board's use of a neighborhood school policy); *Diaz* v. *San Jose Unified School District*, 612 F.2d 411, 415 (9th Cir. 1979) ("[a] neighborhood school policy is not constitutionally suspect"). The racially disproportionate impact of governmental action, moreover, is a reliable indication of discriminatory intent only when it is shown that the impact was not only anticipated but desired—that is, "that the decisionmaker * * * selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 279 & n.25. See also *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 464-465 (1979).

There is no evidence in this record that a racially disproportionate impact was either anticipated or desired by the supporters of Initiative 350. Indeed, Initiative 350 itself is grounded in the race-neutral belief that neighborhood schools promote the overall health of the public school system and benefit minority and nonminority students alike (see note 18, *supra*). Moreover, the suggestion that Initiative 350 would have a discriminatory impact was vigorously disputed by its supporters, who asserted to the contrary that mandatory noneighborhood busing would hasten an exodus of students to private schools, thus aggravating the public school system's existing racial imbalance and threatening the system's educational quality (note 10, *supra*). Supporters of the Initiative argued that implementation of a neighborhood school policy coupled with voluntary integration techniques

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B-25). See also N. St. John, *School Desegregation Outcomes for Children* 136 (1975); Bell, *Book Review*, 92 Harv. L. Rev. 1826 (1979); Armor, *The Evidence on Busing*, 28 Pub. Interest 90 (1972).

could both stem the exodus from public schools and racially balance the system in an educationally sound manner (*ibid.*). On this record, the district court did not and could not find that Initiative 350 was enacted at least in part *because* it would have a discriminatory impact on racial minorities. Thus, the "impact" noted by the district court is not probative of discriminatory intent. *Columbus Board of Education* v. *Penick*, *supra*, 443 U.S. at 464-465; *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 279.

The district court's analysis of the historical background and events leading to the enactment of Initiative 350 was extremely limited. The court focused on the fact that state voters adopted the Initiative in reaction to a mandatory nonneighborhood student assignment scheme, but failed to recognize that the state has never operated a segregated dual school system. Although there has been a history of opposition to nonneighborhood school assignments in the Seattle area (J.S. App. A-34), there is no evidence that the Seattle School District or any other district in the state has ever engaged in de jure segregation. On the contrary, the record in this case demonstrates continuing efforts by the State of Washington's school system to comply with the state constitutional requirement that an adequate education be provided to "all children residing within its borders, without distinction or preference on account of race, color, caste, or sex" (Wash. Const. Art. IX, § 1). See notes 2, 14, *supra*. The district court ignored the state's historic policy of nondiscrimination in its analysis of the motivation behind Initiative 350. See notes 22-24 and accompanying text, *supra*.

The district court correctly concluded that Initiative 350 was "conceived, drafted, advocated and adopted for the specific purpose" (J.S. App. A-34) of rescinding the Seattle School Board's decision to implement a race-conscious student assignment plan that involved transporting students beyond their neighborhood schools. But mere rescission of a racial balancing plan and consequent implementation of a neighborhood school policy does not evi-

dence invidious discrimination. Cf. *Dayton Board of Education* v. *Brinkman*, *supra*, 433 U.S. at 414. Indeed, even the court of appeals conceded that, absent preexisting de jure discrimination, the school districts themselves could choose to adopt a neighborhood school policy without violating the Equal Protection Clause (J.S. App. B-10 n.8). If the school districts could adopt such a policy consistently with the Fourteenth Amendment, there is no reason why a superior decisionmaking entity—the state electorate—could not similarly adopt such a policy, especially when the supporters of that policy, as found by the district court, "acted legally and responsibly in [their] advocacy of Initiative 350" (*id.* at A-22) and "took steps to avoid race becoming an issue in the campaign" (*id.* at A-23).

The final indicator of discriminatory intent noted by the district court—that Initiative 350 constituted a "marked departure from the procedural norm" (J.S. App. A-35) because state educational policy supplanted local policy—has almost no probative weight as evidence of racial animus. As has already been developed, state supervision of and intrusion upon local educational policy *is* the norm in Washington. Statewide initiatives and referendums, furthermore, are widely utilized on many issues of public importance. See note 30, *supra*. See also *James* v. *Valtierra*, *supra*, 402 U.S. at 141. The "state preemption of local autonomy" effected by Initiative 350 and noted by the district court is simply not "a departure from prior state practice" (J.S. App. A-35). It is thus not indicative of invidious intent.

In the final analysis, the district court's finding of discriminatory intent rests solely on its conclusion that Initiative 350 was "drafted, advocated and adopted for the specific purpose" (J.S. App. A-34) of rescinding a racial balancing plan involving mandatory nonneighborhood student transfers when the voters were "well aware" (*id.* at A-33) that the initiative would achieve precisely that result. The court concluded, in other words, that the voters of the state may not knowingly replace a system of racial balancing with a neighborhood school

policy without raising an inference of racial discrimination. The record in this case and the prior decisions of this Court do not support such an inference.

Contrary to the holding of the district court, the record of this case demonstrates that the supporters of Initiative 350 were not motivated by a desire to discriminate against minorities, but rather by a belief that school children and their parents derive substantial benefits from neighborhood schools, regardless of their racial makeup. Supporters of the Initiative believed that mandatory nonneighborhood assignments and busing of students to distant schools deprives both minority and nonminority parents and children of these benefits and, at least in the long run, exacerbates existing racial imbalance in the public schools (see note 10, *supra*).[40] The district court did not find, and there is no evidence in the record to indicate, that the assertion of the above views during the initiative campaign was insincere.[41]

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[40] Experience with mandatory nonneighborhood student assignment and busing plans in many school systems throughout the country indicates that this concern may be well-founded. Indeed, as three Justices of this Court have observed (*Estes* v. *Metropolitan Branches of the Dallas NAACP*, *supra*, 444 U.S. at 450 (Powell, J., joined by Stewart and Rehnquist, JJ., dissenting from dismissal of certiorari)):

> [P]ursuit of racial balance at any cost * * * is without constitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils. By acting against one-race schools, courts may produce one-race school systems.

See also *id.* at 438 ("It is increasingly evident that use of the busing remedy to achieve racial balance can conflict with the goals of equal educational opportunity and quality schools").

[41] Aside from the district court's statement that it could "safely assume" (J.S. App. A-31) that a desire to discriminate against minorities motivated some persons to vote for the Initiative, there is nothing in the district court's findings or in the record to suggest that a belief in the benefits of neighborhood schools was either not held by supporters of the Initiative or was merely a pretense for an invidious desire to deny equal educational opportunity to minorities.

Nor are such views inherently suspect. Indeed, the district court expressly found (J.S. App. A-23):

> A neighborhood school policy has certain advantages in that it facilitates community and parental input and support for educational and extracurricular programs; it minimizes safety hazards to children in reaching school; it reduces the cost of transportation; it eases the task of student assignment through the use of easily determined standards; and it makes for better home-school communication[s].

Because these advantages of a neighborhood school assignment policy inure to the advantage of minority students and parents no less than to that of the majority race, the adoption of such a policy provides no basis in itself for an inference of racial animus. And, even if it is assumed that the racial balancing scheme that the neighborhood school policy replaced provided greater benefit to minority than to majority students, the mere fact of replacing one policy with the other shows nothing more than a tradeoff of one kind of advantage for another. The choice made by the voters of Washington is entirely consistent with a good faith belief that the advantages *for minorities* of the neighborhood school system outweigh the advantages for them of a racial balancing system (a preference reflected in the substantial support for neighborhood schools in the minority community itself.)[42] Because the district court made no findings inconsistent with such a belief on the part of the sponsors and adopters of the Initiative, its finding of discriminatory purpose is entirely without basis. Indeed, the fact that the Initiative imposes no barrier to voluntary transfers out of their neighborhood schools by those who disagree with the voters' policy judgment is a further indication that the Initiative reflects the voters'

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[42] Def. Exh. A-137 (an opinion poll of parents and guardians of children in Seattle public schools found that 65% of minority parents opposed mandatory nonneighborhood student transfers). See also Exh. A. 70-71 ("large numbers of minorities are opposed" to mandatory racial balancing).

effort to promote the best interests of all students, rather than a purpose to discriminate.

Nor is there evidence of racial animus in the fact that the Initiative may also reflect a policy that students should not needlessly be assigned to schools on the basis of race (*i.e.*, in the absence of a need to remedy de jure segregation). It is entirely consistent with our constitutional ideals for the voters of Washington to share the view that "[t]he time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin." *Fullilove* v. *Klutznick*, 448 U.S. 448, 516 (1980) (Powell, J., concurring). See also *id.* at 532 (Stewart, J., dissenting) ("* * * by making race a relevant criterion * * * in its own affairs the Government implicitly teaches * * * that people can, and perhaps should, view themselves and others in terms of their racial characteristics").

Far from ever intimating that a neighborhood school policy is necessarily motivated by a discriminatory purpose or is otherwise inherently discriminatory, this Court in *Swann* v. *Charlotte-Mecklenberg Board of Education*, *supra*, 402 U.S. at 28, unanimously stated that "[a]ll things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest to their homes." See also *Austin Independent School District* v. *United States*, 429 U.S. 990 (1976); *id.* at 991 n.1 (Powell, J., joined by the Chief Justice and Rehnquist, J., concurring). The district court's holding that Initiative 350 was motivated by a discriminatory purpose cannot be sustained unless the Court is now willing to conclude that, as a matter of law, where residential racial isolation exists a policy favoring neighborhood schools is necessarily motivated by a discriminatory purpose.

2. The district court found that Initiative 350 was "overly inclusive in that it prohibits school assignments to achieve racial balance even in a school district where there is de jure segregation * * *" (J.S. App. A-35). In so concluding, the district court erred in several fundamental respects.

In the first place, the district court never should have reached the overbreadth question, which arose only because that court improperly rejected the state Attorney General's interpretation of Initiative 350. The State has consistently taken the position that the Initiative cannot and will not be read to prohibit the use of non-neighborhood mandatory student assignments in the event that the use of such measures is constitutionally required to eliminate de jure segregation. The state Attorney General has averred that if a school district's use of such measures is constitutionally required, the state will not prosecute the district under the Initiative (App. Br. 37-39). The State has "insisted from the outset" that Initiative 350 permits dismantling of de jure segregation "without first having to seek an authorizing court order of some sort" (*id.* at 38-39). As noted earlier (note 28, *supra*), this interpretation of the Initiative by the state Attorney General is entitled to substantial deference. Furthermore, if the district court doubted the soundness of the Attorney General's interpretation of the Initiative, it could have obtained an authoritative resolution of the matter by certifying the question of the Initiative's construction to the State Supreme Court.[43] In the absence of a state court interpretation of Initiative 350, the district court's rejection of the Attorney Generals' interpretation in favor of what it deemed to be an invalidating construction of the Initiative was clearly erroneous. See, *e.g.*, *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 571 (1973); *Lynch* v. *Overholser*, 369 U.S. 705, 719-711 (1962).

Apart from the improper rejection of the state's interpretation of its own law, the district court erred in applying the overbreadth doctrine to a claim arising under the Fourteenth Amendment. This Court has applied the overbreadth doctrine in only the most unusual circumstances, and almost exclusively in cases involving First Amendment rights of expression or association. See,

[43] See Wash. Rev. Code Ann. §§ 2.60.010 to 2.60.090 (1970).

e.g., *Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 624 (1980); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-616 (1973); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *United States* v. *Robel*, 389 U.S. 258 (1967); *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964); *NAACP* v. *Alabama*, 377 U.S. 288 (1964). Indeed, the Court now refers to the overbreadth doctrine as a doctrine of the First Amendment. *E.g.*, *Ulster County Court* v. *Allen*, 442 U.S. 140, 155 (1979); *Bates* v. *State Bar*, 433 U.S. 350, 380 (1977). The district court's acceptance of the overbreadth challenge here extends the overbreadth doctrine past the confines of the First Amendment and into the expanse of the Equal Protection Clause, thus constituting a marked departure from the Court's traditional practice of according the doctrine an extremely narrow scope. See, *e.g.*, *Ulster County Court* v. *Allen*, *supra*, 442 U.S. at 154-163 (reversing a court of appeals decision to entertain an overbreadth challenge to a statutory presumption regarding illegal possession of firearms); *Bates* v. *State Bar*, *supra*, 433 U.S. at 380 (finding little, if any, justification for applying the doctrine to restrictions on commercial speech). See generally *Broadrick* v. *Oklahoma*, *supra*, 413 U.S. at 613 (even in the First Amendment context, the facial overbreadth doctrine "is, manifestly, strong medicine"; "[i]t has been employed by the Court sparingly and only as a last resort").

Even assuming that the plaintiffs in this case were entitled to mount an overbreadth attack on Initiative 350,[44]

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[44] The plaintiff school districts in this action cannot argue that the Initiative impermissibly burdens their duty to remedy de jure racial imbalance because they maintain there is no such segregation in their districts. Rather, their contention is that, even assuming Initiative 350's limitation on mandatory student assignments may be constitutionally applied to themselves, the Initiative is nevertheless unconstitutional on its face because it will prevent other school districts from fulfilling their constitutional duty to eliminate de jure segregation. As this Court has repeatedly held, such challenges run counter to principles of standing "[e]mbedded

it is plain that the district court erred in its assessment of the attack's merit. This Court has established that to invalidate a statute on overbreadth grounds, "particularly where [as in this case] conduct and not merely speech is involved, * * * the overbreadth of a statute must *not only* be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, *supra*, 413 U.S. at 615. See, e.g., *Ohralik* v. *State Bar Association*, 436 U.S. 447, 462 n.20 (1978). The asserted overbreadth of Initiative 350 —that in mandating a neighborhood school policy it impedes efforts to eliminate de jure segregation—is neither *real nor* substantial.

The Initiative's potential for impeding elimination of de jure segregation can be "real" only if there are school districts in the state of Washington that are, and recognize that they are, unconstitutionally segregated. The district court made no such finding. Nor is there any evidence in the record to support such a finding. Given the State of Washington's tradition of nondiscrimination, the fact that the State has never operated a statutory dual school system, and the State's assertion, uncontradicted by the record and uncontested by the parties, that "no Washington school district has ever been judicially declared to have committed a single act of intentional racial segregation in violation of the Fourteenth Amendment in the operation of public schools" (J.S. 4), any

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in the traditional rules governing constitutional adjudication." *Broadrick* v. *Oklahoma*, *supra*, 413 U.S. at 610. As a general rule, if there is no constitutional defect in the application of a statute to a litigant, the litigant does not have standing to argue, as the school districts have argued here, that the statute "would be unconstitutional if applied to third parties in hypothetical situations." *Ulster County Court* v. *Allen*, *supra*, 442 U.S. at 155; *Broadrick* v. *Oklahoma*, *supra*, 413 U.S. at 610-611 ("These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws").

assumption that such school districts must exist has little justification.[45]

Initiative 350, furthermore, will not inhibit in any "substantial" fashion a school district's compliance with its constitutional duty to operate a unitary school system. Because the Initiative specifically provides that it "shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools" (Wash. Rev. Code Ann. § 28A.26.060 (Cum. Supp. 1981), if an action were brought against a school district for violating the Initiative's ban on nonneighborhood student transfers, a district that believed such action was constitutionally required would be entitled to assert its affirmative constitutional duty to dismantle de jure segregation as a defense. The Initiative, therefore, would not interfere with either the school districts' duty to conform its conduct to constitutional requirements or the courts' obligation to enforce the Constitution. *Cf. North Carolina Board of Education* v. *Swann, supra*, 402 U.S. at 44-46. Moreover, as already developed, the State has consistently maintained that the Initiative does not inhibit measures necessary to eliminate de jure segregation. See note 28, *supra*.

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[45] It would be pure speculation to assume further that, if such districts exist, their de jure racial imbalance is likely to be so substantial that the districts would be unable to effectively eliminate it within the constraints imposed by the Initiative. Cf. *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977) (federal court must tailor the scope of a desegregation remedy to the "incremental segregative effect" of the constitutional violation); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 436-437 (1976). The Initiative does not prohibit the use of voluntary racial balancing measures. Nor does it prohibit the use of mandatory measures if imposed in a "nearest or next nearest" school context. The Initiative specifically provides that it in no way limits the authority of school districts to close school facilities. Wash. Rev. Code Ann. § 28A.26.030 (Cum. Supp. 1981). See also note 11, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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